

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





74-1520

Original  
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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

-----X  
UNITED STATES OF AMERICA ex rel.,  
MARTIN SOSTRE,

Petitioner-Appellant,

-against-

Docket No.  
74-1520

FRANK M. FESTA, Superintendent of  
Erie County Jail; and ROBERT J.  
HENDERSON, Superintendent of Auburn  
Correctional Facility,

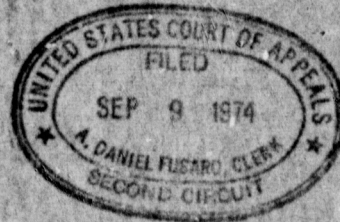
Respondents-Appellees.  
-----X

BRIEF FOR RESPONDENTS-APPELLEES

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STATE OF NEW YORK )  
 : SS.:  
COUNTY OF NEW YORK )

Julene R. Silverman, being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for herein. On the 6<sup>th</sup> day of Sept, 1974, she served the annexed upon the following named persons:

Herman Schwartz  
525 O'Brien  
Hall  
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Attorneys in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Julene R. Silverman

Sworn to before me this  
6<sup>th</sup> day of Sept, 1974

[Signature]  
Assistant Attorney General  
of the State of New York



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BRIEF FOR RESPONDENTS-APPELLEES.

Question Presented

Was the District Court finding, after an evidentiary hearing, that appellant's conviction was untainted by perjured testimony clearly erroneous?

Statement

This is an appeal from an order of the United States District Court for the Western District of New York (Curtin, J.), dated March 15, 1974, which denied petitioner's application for a writ of habeas corpus.

History of the Case

On March 18, 1968 a judgment of conviction was entered in the Erie County Court (Marshall, J.) convicting Petitioner,



Martin Sostre, of the crimes of illegal sale of a dangerous drug, illegal possession of a dangerous drug, and assault in the second degree. He was sentenced to an indeterminate term of imprisonment for a minimum of not less than twenty-five (25) years and a maximum of not more than thirty (30) years for the illegal sale of a dangerous drug, not less than five (5) years and not more than ten (10) years for the crime of assault in the Second degree, and a definite term of imprisonment of one year in the Erie County Penitentiary for the illegal possession of a dangerous drug. Sostre was also sentenced to thirty (30) days in the Erie County Jail for contempt of Court committed on the 15th day of March, 1968. All sentences were ordered to run consecutively.

By petition dated March 30, 1972, appellant sought a writ of habeas corpus alleging that the principal witness for the prosecution, Arto Williams, had recanted his testimony that appellant had sold him drugs.

On May 17, 1972, pursuant to 28 U.S.C. § 3006, Herman Schwartz, Esq., was assigned to represent the appellant in the District Court.

On August 11, 1972, counsel for appellant moved to amend the petition to add Robert J. Henderson, Warden of the Auburn Correctional Facility, as a party and to allege that without the testimony of Arto Williams, no conviction could have been had and that the agents of the prosecution must have known of the perjured testimony. On August 11, 1972, the District Court granted the motion to amend the petition. On September 27, 1972, respondent Henderson was directed to answer appellant's claims.

On May 14, 1973, the District Court issued writs of habeas corpus ad testificandum for the production of appellant and Arto Williams so that a hearing could be held on the petition. The hearing commenced on May 29, 1973 and concluded on May 30, 1973.

#### The Trial

On the 4th day of March, 1968, trial commenced in County Court, County of Erie (Marshall, J.) under Indictment No. 33,508-3 charging appellant with a violation of Section 1751, Subd. 2 (sale of heroin), Section 1751-a (possession of heroin), and Section 242, Subd. 5 (assault in the second degree) of the Penal Law of the State of New York.

Appellant was not represented by counsel at the trial because of his rejection of the offer of various assigned counsel by the Court. (30,116-117) However, several attorneys were available to Sostre during the course of the trial.

The first witness for the People was Arto Williams. Williams testified that he had known Sostre for about a year or two (32) and identified him as being present in the courtroom.

Williams testified that on July 14, 1967, he was acting as an informant for the Buffalo Police Department, that on that day he met with Detective Gristmacher and a State Trooper at Buffalo Police Headquarters. (33-34) He testified that he was searched by Detective Gristmacher in the presence of the State Trooper whereupon he was driven to Woodlawn and Dupont by Detective Gristmacher in the presence of State Trooper Steverson. (34-35) Williams said that he had been given \$15.00 after he was searched by Detective Gristmacher. (35-36)

After arriving at Woodlawn and Dupont, Williams and Steverson entered a bookstore at 1412 Jefferson Avenue operated by Martin Sostre. (36) Also present in the bookstore at the time of their entry was a woman identified by Williams as Sostre's girl-friend. (36)



Williams testified that he asked Sostre whether he was "doing any business" and Sostre responded that he "did not want to do any business with any strangers in the store". (37) At that point he and Trooper Steverson went out of the store. He returned to the store, leaving Trooper Steverson in front of the store. Williams testified that from where he was standing, he was able to see Steverson after he went back into the store. (37) He asked Sostre whether he could "cop a bag" and Sostre responded "yes." (38) Williams gave Sostre the money he had previously been given by Gristmacher, Sostre took it and passed it to the female standing in the bookstore. She counted it and told Sostre that it was alright. Sostre then proceeded to the back of the store, remained a few minutes, came back out and handed Williams a bag. Williams left the store.

Upon leaving the store, Williams met State Trooper Steverson who was still standing in front of the open door and the two of them proceeded to Detective Gristmacher's vehicle. (30) He gave the bag to Detective Gristmacher. (38a)

Williams identified People's Exhibit #1 for Identification, a glassine bag, as the same glassine bag that had been given him by Sostre at Sostre's bookstore. (30) Sostre

refused to cross-examine Williams. (40)

The next witness called was Louis T. Steverson, a Trooper with the New York State Police. Steverson confirmed the meeting between himself, Gristmacher and Williams (44) and that Williams was searched in his presence at 10:30 P.M. (45) Steverson further testified that he and Williams entered the Afro-Asian Bookstore at 1412 Jefferson Avenue and identified the defendant Sostre and a woman, (Miss Robinson) as having been present on that evening. (46) At the time of their entry into the store, Williams asked Sostre if he, Williams, could "cop a bag." (46) Sostre turned towards Steverson, looked at him, and stated that he did not know Steverson and that he would not do any business in front of a stranger. (47) Steverson left the store in the presence of Williams and positioned himself in the doorway of the store with the door open. (47) He saw Williams give the woman identified as Miss Robinson some money, that she counted it, said something to Sostre, whereupon Sostre turned, walked to the rear of the store, came back up front, and handed Williams a white glassine envelope. (47-48)

Thereafter, Steverson and Williams returned to Detective Gristmacher's parked vehicle. Williams handed the glassine envelope to Gristmacher. (48).

Steverson identified People's Exhibit #1 as the same glassine envelope which Sostre had given to Williams and which Williams delivered to Detective Gristmacher. (48) Steverson testified that the glassine envelope contained a white powder. (50)

Sostre refused to cross-examine Steverson. (50)

The next witness for the People, was John Steinmetz, an Investigator for the New York State Police, Bureau of Criminal Investigation. (51) Steinmetz testified that he was in a surveillance spot on the opposite side of the street from 1412 Jefferson Avenue on the 14th day of July, 1967, taking photographs and observing the operations at 1412 Jefferson Avenue. He was accompanied to that position by State Trooper John Wilcox. (51-52) He observed State Trooper Steverson and Williams enter the bookstore at 1412 Jefferson Avenue at about ten minutes to twelve on July 14, 1967. He observed Williams and Steverson turn back out of the store. Steverson remained in the doorway, looking back into the store, and Williams re-entered the bookstore. Several minutes thereafter Arto Williams come out of the bookstore and Williams and Steverson walked back to Woodlawn Avenue and across Jefferson.



Sostre refused to cross-examine Investigator Steinmetz.  
(53)

The next witness for the People, was Investigator John P. Wilcox, a member of the New York State Police. (54) Wilcox testified that he had been taking movies of people entering and leaving 1412 Jefferson Avenue during a period of three days preceeding July 14, 1967. (55)

Wilcox testified that on July 14, 1967, he and Steinmetz were together in a building across the street from 1412 Jefferson Avenue, on the second floor. At approximately 11:50 P.M., he observed Williams and Steverson cross the street at Woodlawn and Jefferson and enter 1412 Jefferson Avenue. Wilcox observed Trooper Steverson come outside the building and further observed Williams handing money to Sostre's female companion inside the bookstore. Sostre went to the back of the bookstore, returned to the front of the bookstore and handed Arto Williams "something." Thereafter, Williams left the bookstore. (56)

Steinmetz testified that he made those observations aided by a telephoto lens on his camera. (57)

Sostre waived cross-examination. (57)

The next witness called for the People, was Alvin R. Gristmacher, a Detective Sergeant in the Narcotics Squad of the Buffalo Police Department. (57) Gristmacher testified that he met with Williams on July 14, 1967 at approximately 9:30 P.M. at Buffalo Police Headquarters. He introduced Williams to Trooper Steverson. (58) Thereafter Gristmacher searched Williams and gave him \$15 in marked money.

Gristmacher drove Steverson and Williams to the corner of Dupont and Woodlawn whereupon Williams and Steverson left Gristmacher's automobile and walked west on Woodlawn Avenue out of Gristmacher's line of vision. Ten minutes later Steverson and Williams handed Gristmacher a glassine envelope containing a white powder. (59) Gristmacher placed his initials and the date on the glassine envelope and kept it in his possession until July 17, 1967 at which time he turned it over to the Buffalo Police chemist. (60)

Gristmacher identified People's Exhibit #1 as the glassine envelope which Williams gave him on July 15, 1967. (60)

Sgt. Gristmacher described a search of the bookstore based upon a search warrant and the taking into custody of the defendant, Sostre. (60-61)

Gristmacher found a marked \$10 bill in Sostre's possession upon searching Sostre after he was placed under arrest. (62) Gristmacher testified that this \$10 bill was the same \$10 bill which he had given to Williams at approximately 9:30 that evening. (62)

Sostre refused to cross-examine Gristmacher. (67)

The next witness called on behalf of the People, was Thomas Constantine, an Investigator with the Bureau of Criminal Investigation of the New York State Police. (68)

Investigator Constantine testified to a search in which he participated of the premises at 1412 Jefferson Avenue on July 15, 1967. (69) Constantine testified that upon the execution of the search warrant he found Martin Sostre and a female companion inside the bookstore along with two young males. (69)

Constantine testified that he searched the back portion of the store and in a filing cabinet located against the wall in



the top drawer, he found a small pocket of glassine envelopes with a rubber band around them. (71) The ten glassine envelopes contained a white powder. (71) The glassine envelopes were marked for identification (72) and were identified by Constantine as the same envelopes which he found in Sostre's bookstore. (72)

The next witness called was Ronald T. Smith, a Detective Sergeant on the Narcotics Squad of the Buffalo Police Department. (73) Smith detailed the attack upon himself during the search of the store by Sostre while armed with a razor blade knife. (73-79)

Sostre refused to cross-examine Smith. (79)

Smith was recalled to the stand (88) and testified that Investigator Constantine turned over ten glassine envelopes containing a white powder to Smith on the evening of the raid at 1412 Jefferson Avenue. (88-89) He subsequently turned over the evidence to a police chemist. (89)

Sostre again refused to cross-examine the witness.  
(91)

Alvin R. Gristmacher was recalled to the stand (92). He testified that on the night of the raid he was in the possession of a search warrant which had been signed by Judge Joseph A. Sedita, Associate Justice of the City Court of Buffalo. The search warrant was introduced into evidence. (93)

The next witness for the People was Alexander Rock, a member of the New York State Police. (94) Investigator Rock testified that he participated in the arrest at 1412 Jefferson Avenue on July 15, 1967. (94) Investigator Rock confirmed the earlier testimony of Detective Sergeant Gristmacher, State Police Investigator Thomas Constantine and Police Officer Ronald T. Smith. (94-97)

Bruce Jenson of the Federal Bureau of Narcotics was the next witness called by the People. (98) Agent Jenson testified that on July 15, 1967 he was present at 1412 Jefferson Avenue at approximately 12:05 A.M. (99) Jenson testified that he placed Geraldine Robinson, the female companion of Martin Sostre, under arrest and conducted a search of her purse. He discovered five one dollar federal reserve notes which he testified had been marked in his presence. (100-103)



Sostre again waived his right to cross-examine. (103)

Next testifying for the State was Joseph Vaughan, (104) the chemist employed by the Buffalo Police Department. Vaughan was qualified as an expert in chemistry and testified that the exhibits seized from Sostre during the search of his store and the glassine envelope which Williams had purchased from Sostre all contained heroin. (104-111)

Sostre again waived his right to cross-examine the witness. (111)

The prosecution rested. (111)

#### The Hearing

Williams testified that he was released from jail on July 14, 1967 and met with Detective Sergeant Alvin Gristmacher of the Buffalo Police Department, Narcotics Division. (31) After receiving some money from Gristmacher, Williams stated that he took a bus to the east side of Buffalo where he purchased a bag of heroin. (90) This occurred sometime between 2:00 and 4:00 P.M. (90)

After purchasing the bag of heroin, he used half of it and saved the other half. (92) At some later time that day, he shot up some more drugs. (93) He met with Sergeant Gristmacher at 9:00 in the evening, (32) at which time he was very high. (33)

After meeting with Detective Sergeant Gristmacher, he and Gristmacher entered Gristmacher's private car and drove to the Buffalo Police Department Headquarters, where he waited in the car. (33)

When Sgt. Gristmacher returned, some 15 minutes later, in the company of another police officer, he got out of the car and was searched. By that time, Williams testified that he had already placed the remaining drugs under the front seat of the car. (33)

Subsequent to the search of his person and pockets, he entered the back of the car while Detective Sgt. Gristmacher and the other police officer got into the front of the car. (100)

During the intervening period between the drive from Buffalo Police Headquarters to a Judge's home and thereafter, to 1412 Jefferson Avenue, he bent down from the rear seat of the vehicle, reached under the bottom of the front seat and retrieved

the half bag of heroin, which he had earlier secreted, without drawing any suspicion from either of the two police officers sitting in the front seat of the car. (107) Williams stated that the half bag of heroin was approximately 1-7/8 inches long by 7/8 inches wide. (148)

After arriving at the store, he went into the bookstore with Officer Steverson, saw appellant, and asked him "What's happening". While he was talking to him, he indicated that he wanted to see him personally, but he couldn't recall the motion he made. (34) He gave appellant the \$15.00, and after appellant took it, he brought his hand back across the counter and went to his shirt pocket. He had never asked appellant to keep money for him before but he once asked him to hold a suit. (35) After he gave appellant the money, appellant went to the back of the store and he heard him talking to Geraldine Robinson. (36) Although Williams' transaction was completed, he remained at the front of the store. Appellant eventually returned to the store, they talked for a while and he left. (36) He then gave the drugs he had in his pocket to Gristmacher. (36)

On cross-examination, Williams testified that after testifying at appellant's trial, he was placed on probation on a pending Erie County charge and, thereafter, in July, 1969 went



to California without the permission of the Probation authorities.

(78) He thought it wasn't safe for him to be in Buffalo because of the statements he had made in the Sostre case. (78-79) He denied that any threats were made to him or his parents, although he conceded that he feared for his life and that his parents were worried. (79-80)

While in California in 1970, he joined an organization called Tuumest. In this organization he learned to be honest with himself and others and how to live within the eyes of the law and it was this influence which prompted him to change his testimony. (81-82) In April, 1971 he wrote an affidavit recanting his testimony. (83) He denied that subsequent to this affidavit that he was arrested on felony charges in California. (86)

Sostre testified that he had not sold drugs to Arto Williams at any time, including the night in question, July 14, 1967.

Peter Notaro, an Assistant District Attorney with the Erie County District Attorney's Office, testified for the respondents. Notaro was the Assistant District Attorney who prosecuted Sostre in March, 1968. Notaro testified that after the trial of Sostre, Williams stated to Notaro that he was in fear of being injured by friends of Sostre because of his testimony against Sostre. (159)

John D. Steinmetz, an Investigator in the Bureau of Criminal Investigation of the Division of New York State Police, testified that he was on an assignment of surveillance of the Sostre bookstore at 1412 Jefferson Avenue on July 14, 1967, the evening of the sale. (165) He was accompanied at that location by John Wilcox, a member of the New York State Police. (165) He was able to observe Williams and a New York State Police Officer enter the bookstore at 1412 Jefferson Avenue and was further able to observe the individuals while inside. (168-167) Steinmetz testified that Investigator Wilcox was also observing the transactions at the bookstore, aided by a telephoto lens attached to a still camera. (174)

Lt. Thomas Constantine of the Division of New York State Police, testified that on July 15, 1967, he in the company of other police officers of State, Federal and local government agencies executed a search warrant at 1412 Jefferson Avenue. He discovered a package of glassine envelopes containing a white powder in a filing cabinet in the back room of the Sostre bookstore. (185)

New York State Trooper Louis Steverson, testified that on July 14, 1967, he accompanied Arto Williams to the bookstore located at 1412 Jefferson Avenue. (200-201) He was able to

observe, from a vantage point directly outside an open door, Williams hand a sum of money to a girl in the store. Sostre then went to the back of the bookstore, came forward, and handed Williams a white glassine envelope. (203-204)

Opinion Below

After extensively analyzing the evidence at both the trial and the hearing, the District Court held that appellant had failed to establish that Arto Williams' testimony at trial was false. The District Court observed that the record was clear that Williams feared injury in Buffalo after he testified at the 1968 Sostre trial. Yet, notwithstanding his fear of injury, he testified it was not until 1970 when he joined an organization called Tummeast, which he explained as devoted to influencing its members to be honest with themselves and to live within the eyes of the law, that he decided to execute the April, 1971 affidavit, recanting his trial testimony.

The Court questioned the sincerity of his motives since after the affidavit, he was arrested in September, 1972 and December, 1972 in California on heroin felony charges. In early 1973, he pled to a misdemeanor drug count. The District Court observed that Williams' attitude was less than candid at the hearing since when cross-examined about these events, he



stated that he had not been arrested for a felony charge and tried to explain away the arrest by insisting it was for the sale of baby aspirin.

The District Court additionally found Williams' story of the events of the evening of Sostre's arrest on its face open to serious question. By his own account he was "high" from drugs and had no idea of what he was expected to do. Yet he claimed that he secreted a tiny envelope under the front seat of the car and retrieved it while sitting in the back in the presence of two police officers without them being aware of it. Moreover, one of the officers, Steverson, testified that Williams was not even in the rear seat, but remained in the front seat at all times.

The District Court further observed that each time Williams testified about his transaction with Sostre, he gave a different account. At trial, he said he gave the \$15 to Geraldine Robinson who was in the front of the store and that Sostre went to the rear of the store, returned, and handed him an envelope. At the hearing, he testified he gave the \$15 to Sostre, Sostre went to the rear of the store where he spoke with Geraldine Robinson, returned and conversed briefly with him.

The Court went on to note that Williams' trial testimony was confirmed by Trooper Steverson at both the trial and hearing and by other witness.

Finally, Williams' testimony on direct and cross-examination at the hearing was conflicting. On direct, he testified that after he gave the money to Sostre, he brought his hand back across the counter to his shirt pocket. Upon cross-examination, he said he waited until Sostre returned from the rear of the store before putting his hand to his pocket.

The District Court noted that although there was reason to question Williams' testimony there was no reason not to believe the police officer's, testimony which supported Williams' original trial testimony. The District Court denied petitioner's application.

#### ARGUMENT

THE DISTRICT COURT'S FINDING  
THAT ARTO WILLIAMS DID NOT  
TESTIFY FALSELY AT APPELLANT'S  
TRIAL WAS SUPPORTED BY THE  
EVIDENCE AND WAS NOT CLEARLY  
ERRONEOUS.

After a full hearing during which the District Court had an opportunity to observe Arto Williams and other witnesses, the Court found that the testimony given by Williams at



appellant's trial was not false. Contrary to appellant's argument here, Judge Curtin's determination was based almost exclusively on his assessment of the credibility of Williams and the other witnesses at the District Court hearing. Judge Curtin, as the trier of fact, found Williams unworthy of belief. This conclusion was amply supported by the record below and in no sense can it be argued that this finding was clearly erroneous. Federal Rules of Civil Procedure 52(a), U.S. ex rel. Rosa v. Follette, 395 F. 2d 721, 726 (2d Cir. 1968), cert den. 393 U.S. 892 (1968); U.S. ex rel. McGrath v. La Vallee, 348 F. 2d 373, 376 (2d Cir. 1965), cert den. 383 U.S. 952 (1966).

Williams version of the events that transpired on the evening of July 14, 1967 was simply incredible as he strained to tell a story that would fit in with the testimony of the different police officers who had accompanied him to appellant's store.

Williams related at the hearing in the District Court that after his release from jail on July 14, 1967 and after receiving money from Gristmacher, he purchased a bag of heroin, used half and saved the other half. Thereafter, later on in the day and before meeting Gristmacher, he again shot up some more drugs.

He testified that he was very high (H 33)\* at the time of the meeting. Yet, notwithstanding this condition and the fact that he was unaware of the exact plans for that evening, he concocted a scheme for hiding the drugs he had purchased earlier in the day under the front seat of Gristmacher's car, anticipating retrieving them later in the evening. He then related that from the rear seat, he was able to locate the tiny envelope, 7/8" x 1 7/8" without arousing the attention or suspicion of the two police officers who were accompanying him.

Even passing the hurdle of an individual high on heroin from executing such a scheme, there remains the additional fact that Williams was unaware of the exact plans for the evening and that it was entirely possible that the search of his person would be made after he had been deposited in the vicinity of the bookstore and that he would thus have no opportunity to return to the car to retrieve the drugs.

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\* Numbers in parenthesis preceded by the letter H refer to the transcript of the proceedings before the District Court. Numbers preceded by the letter T refer to pages of the trial transcript.

In addition to the incredibility of Williams' hearing testimony, Williams' alleged motive for recanting his testimony rendered his testimony suspect. Williams himself stated that he thought it was not safe for him to remain in New York after he testified at appellant's trial. (H. 78) (See also Exhibit J, hand written letter from Williams to an official of the California State Department of Probation, in which Williams states, "I guess by now you know my life is in danger").

Yet he did nothing to recant his testimony until 1971 when he joined an organization entitled Tumm East. Williams testified that this organization taught him to live within the eyes of the law and that it was this influence which prompted him to decide that it was his duty to return to Buffalo to alter his testimony. (H. 82) However, subsequent to his affidavit of April, 1971, in which he recanted his trial testimony he was arrested and charged with having committed crimes in California.

Aside from these factors, Williams at the hearing had difficulty keeping his story internally consistent as well as consistent with the observations of the other witnesses.



On direct examination, he testified that after handing appellant the \$15.00, he brought his hand up to his shirt pocket. Yet, on cross-examination, he stated that after he gave appellant \$15.00, appellant proceeded to the rear of the store and when appellant returned, he than touched his hand to his pocket.\*

Taking himself further astray, on direct examination, Williams testified that he originally sat in the front seat of the car and that he placed the tiny envelope containing the drugs under the front seat. On cross-examination, he stated that after the search by Gristmacher, he returned to the rear of the car and that he was able, nonetheless, to retrieve the drugs from his new position unobserved. However, Williams outdid himself with his testimony, since as it developed, Officer Steverson testified that Williams returned to the front seat of the car, not the rear. (H. 200) Steverson further testified that he was able to observe Williams' head and a portion of Williams shoulders at all times during their presence in Gristmacher's

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\* Moreover, as the District Court observed, insofar as Williams testified on direct that he touched his hand to his pocket, there was no reason for him to remain any longer in the bookstore as the "buy" had been completed and he had already asked appellant to hold the \$15.00. Yet, Williams, on direct, testified that he remained in the store after he handed appellant the \$15.00, notwithstanding that appellant had gone to the rear of the store.

automobile and no time did Williams bend over or reach under the front seat of the car. (H. 201)

As for appellant's movements in the store, at the hearing, Williams testified that after he gave appellant \$15, appellant went to the back of the store, Williams heard some voices, and then Sostre came back to the front of the store. Williams believed that Sostre was talking to Geraldine Robinson who according to Williams was in the back of the store. (H. 36)

However, at the trial, Williams testified that Geraldine Robinson was in the front of the store and that appellant handed the money directly to Geraldine Robinson. (T. 203, 218) This testimony was generally confirmed by Officers Steverson and Wilcox each placing Geraldine Robinson at the front of the store. (H. 203-204, T. 47-48, 56).

Even assuming Williams to have testified falsely at appellant's trial, there would have been no reason for him to lie about Geraldine Robinson's location. It was of absolutely no importance to the charge whether Geraldine Robinson was standing in the front or rear of the store. It only became important as Williams searched at the hearing for a reason to explain why appellant had gone to the back of the store after



Williams handed over the \$15. It is clear that Williams was manufacturing facts to fit his recently revised version of what had occurred.\*

Williams testified that he indicated to Sostre with some sort of gesture that he wanted to speak with Sostre privately. However, at the hearing he could not remember the gesture he made and was unable to demonstrate it to the Court. It is clear, as Officer Steverson testified, that appellant's suspicions were aroused when Williams indicated to appellant that he wished to purchase heroin whereupon appellant asked Steverson to leave the store since he did not know him. (H. 202) Although Williams and Steverson's trial testimony did not dovetail specifically at this point, both recalled that Williams did state that he wanted to "cop a bag".

Finally Williams lack of credibility was driven home by his evasiveness and untruthfulness in responding to questions about his arrests in California and his reasons for leaving Buffalo to go to California.

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\* The District Court opinion recites that Williams testified at trial that he gave the money to Geraldine Robinson in the front of the store. Although appellant in this Court attempts to maximize this misstatement, the significance of Judge Curtin's conclusion remains unimpaired, i.e., that Geraldine Robinson was in the front not the rear of the store, and that Sostre went to the rear to obtain the bag of heroin that Williams had just purchased.

Although appellant attempts a tortured analysis of Williams' testimony in the District Court in an attempt to demonstrate that Williams testified truthfully about his criminal record, in point of fact, Williams' testimony was misleading. Notwithstanding the two arrests in 1972 on felony drug charges in California (see Exhibits E and F), Williams testified:

"Question: I am referring to the date, your Honor, which the witness testified to as being in April, 1971. I am establishing as a matter of fact, that after the affidavit was written, he was arrested on felony charges in the State of California.

Answer: That is incorrect.

Question: What is incorrect?

Answer: I was not arrested after. It was before, a year before." (H. 86)

Additionally, Williams in an effort to substantiate his story that he was recanting because of his experience with an organization called Tumm East, strove at the District Court hearing to minimize his fear of retaliation after his testimony at appellant's trial in 1968 and his testimony in the District Court was similarly evasive on this point.

Williams testified that he was not being threatened (H. 79); that he never heard of any threats (H. 79); that nobody

said they were ever going to get him nor did he ever hear from anybody that they were going to get him. (H. 79) At one point, Williams agreed that he left Buffalo because he feared for his life (H. 79), but then immediately changed that testimony and stated that he just wanted to be safe.

"Question: So as a matter of fact, you left Buffalo because you feared for your life, is that correct?

Answer: I guess you would say that.

Question: No Mr. Williams, I want to know what you--

Answer: I didn't exactly fear for my life, I just wanted to be on the safe--." (H. 79).

Yet, in 1968, Williams had told Peter Notaro that he feared retaliation by friends of appellant, and Exhibit J, Williams' letter to the California Department of Probation, states that he feared for his life.

In addition to observing Arto Williams, the District Court was in a position to assess the credibility of Officer Steverson. After weighing all the evidence, including direct questioning of Williams by the District Court, Judge Curtin found William's recantation unbelievable and his story incredible.



Appellant has utterly failed to establish that this finding was clearly erroneous. Federal Rule of Civil Procedure 52(a).\*

CONCLUSION

THE ORDER OF THE DISTRICT COURT  
SHOULD BE AFFIRMED.

Dated: New York, New York  
September 6, 1974

Respectfully submitted,

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\* Appellant additionally resurrects in this Court his argument that the police knowingly used Williams' allegedly perjured testimony. However as Judge Curtin observed, appellant failed to show any conspiracy or that the police were aware of any manufactured testimony, and appellant's argument imputing such use to the police is without merit.